No. 10117

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the Estate of Marvin Polakof,

*Appellant,*

*vs.*

MARVIN POLAKOF and IVAN POLAKOF,

*Appellees.*

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## APPELLANT'S BRIEF.

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## APPELLANT'S BRIEF.

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### Jurisdiction.

This appeal is by the plaintiff from a judgment for the defendants in an action brought in the District Court for the Southern District of California by the plaintiff as a trustee in bankruptcy against the bankrupt, the defendant Marvin Polakof, and his brother, the defendant Ivan Polakof. The object of the action is to quiet title to a parcel of improved real property located in Los Angeles County, California, and to set aside a fraudulent transfer of the property by Marvin Polakof to Ivan Polakof. [Complaint, R. 2-7.]

The jurisdiction of the District Court was based upon Sections 23c and 70e, Bankruptcy Act (11 U. S. C. A. 46c and 110e).

The action was tried before Judge Ben Harrison without a jury and resulted in a decision for the defendants. [R. 18-25.] Judgment was entered for the defendants on October 31, 1941. [R. 25-27.]

Within the statutory time the plaintiff filed his notice of appeal to this court. [R. 28.]

The jurisdiction of this court is invoked under Section 128, Judiciary Code (28 U. S. C. A. 225).

## Statement of the Case.

Two main issues were formulated by the pleadings and tried before the trial court: (1) Did Marvin Polakof, the bankrupt, own the property for a period of several years prior to the bankruptcy? (2) Was the transfer of the property by Marvin Polakof to Ivan Polakof fraudulent?

The trial court found for the defendants on both issues, *i. e.*, that Ivan Polakof was the owner of the property during the entire period and that Marvin Polakof never had any interest in it [Finding V, R. 21], and that there was no fraud in the record transfer of the property by Marvin Polakof to Ivan Polakof. [Findings VIII and IX, R. 22.]

This appeal is predicated mainly upon the contention that these findings are against the weight of the substantial evidence. We therefore deem it important to present at the outset a resumé of the evidence bearing upon the two issues, but before proceeding with the discussion of the evidence about the property itself it is necessary to consider the background of this litigation.

Marvin Polakof and Ivan Polakof are brothers and the sons of Sam Polakof, with whom they maintained their home until his death in 1940. There was a close family and business relationship between the father and sons during the period herein involved. [R. 123, 210.]

The wine distributing business, which was nominally owned by Marvin Polakof under the name of Ace Distributing Company when it was adjudged a bankrupt on December 5, 1940, was originally organized by Ivan Polakof in 1934. The business remained at the same address—786 Kohler Street, Los Angeles,—from its inception in 1934 until its demise in 1940. Sometime around 1935 Ivan Polakof made a gift of the entire business, including equipment, merchandise and goodwill, to Marvin Polakof. Thereafter Marvin Polakof was formally the owner of the business, but Ivan Polakof continued to work for the business intermittently and to take an active interest in its welfare. Even as late as January, 1939, Ivan Polakof was working for the business, while at the same time he was attending school. [R. 142, 160, 231-232, 237-238, 247, 250.]

Although the formal ownership of the business was changed from one brother to the other, neither was actually in charge of the business operations while their father was alive. It was the father, Sam Polakof, who ran the business for the family from the outset and devoted all his time to it, while both Marvin and Ivan were studying for professions and spending considerable periods of time away from Los Angeles. [R. 142-144.]

In July, 1936, Marvin Polakof executed a power of attorney in favor of Sam Polakof, which was recorded in the Los Angeles County Recorder's office. Under this

power of attorney Sam Polakof was given the most sweeping powers to act on behalf of Marvin Polakof in any matter whatsoever, in the same manner as if Marvin Polakof had acted personally. [Exh. 4, R. 103-105.]

Among the activities of the business handled by Sam Polakof was the arrangement of credits. [R. 144.] On March 1, 1940, or within less than a year prior to the bankruptcy, Sam Polakof issued a financial statement [Exh. 7, R. 147-150] for

> "Sam Polakof and Sons,
> Customer at ..... office
> Address—786 Kohler Street,
> Los Angeles, Calif.
> Business—Wholesale liquor dealer."

It was conceded (1) that the only business with which Sam Polakof was connected in 1940, was the one which became bankrupt several months later; (2) that the bankrupt was the only wholesale liquor business at 786 Kohler Street, Los Angeles, in March, 1940; (3) that there was no other business then located at 786 Kohler Street, Los Angeles. [R. 142-145.]

The only conclusion that can be drawn is that this statement on behalf of Sam Polakof and Sons was made on behalf of the business which subsequently became bankrupt, because there was no other business to which it could have referred.

This statement which, as will be shown, lists the property herein involved as an asset of the business [R. 150], speaks louder than words. It confirms what appears obvious throughout the evidence, *i. e.* (1) that there was no line of demarcation where the interests of the father

or one of the brothers began and the interests of the others ended; (2) that the formal ownership of the business in one or the other of the brothers was of no consequence; and (3) that the business was owned and operated by Sam Polakof and the two sons as a family matter.

Incidentally, it is to be noted that this statement of March 1, 1940 listed assets of $39,594.67 [R. 148] and liabilities of $9,970.68 and a net worth of $27,623.99. [R. 149.] On October 24, 1940, after the death of Sam Polakof, another statement was issued for the business over the signature of Marvin Polakof, which showed assets of $45,341.85, liabilities of $19,697.34 and a net worth of over $25,000.00. [Exh. 9, R. 155.]

Nevertheless, only 6 weeks later—December 5, 1940—the business was adjudicated a bankrupt with the liabilities far out-weighing the assets. The discrepancy, between the handsome net values reflected in the statements and the bankrupt condition actually existing a short while later, is so glaring as to need little comment.

Another significant item of evidence is the testimony of Maurice Kahn, an accountant, who was in charge of the books of Ace Distributing Company and who prepared a statement of the financial status of the business for the year 1939. [R. 178-195.]

In explaining the financial set up as of April 30, 1939, Kahn testified [R. 188]:

> "In going over the records as of April 30th, Marvin Polakof himself is charged with $26.15. Then there is set up, as assets here, Sam Polakof $1300, and Ivan $300."

If the business belonged solely to Marvin Polakoff why did its books show charges and credit against all three Polakoffs?

We only cited a little of the evidence relating to the three Polakoffs, but a reading of the entire record will prove even more overwhelmingly, if not conclusively, that the bankrupt business was an instrumentality of both father and sons and not the exclusive domain of Marvin Polakoff.

We now come to the property involved in this action.

The property consists of a lot improved with an industrial building in the eastern part of Los Angeles County. There was a considerable divergence in the testimony as to the value of the property. Marvin Polakoff attempted to belittle its value and testified that it was worth only between $150.00 and $250.00, while appraisers testified that the value was between $650.00 and $950.00. (R. 37-38, 76, 86.) But here again the documentary evidence is overwhelming in favor of the higher valuation, because (1) in the financial statement which was issued on March 1, 1940, Sam Polakoff who managed and ran the property stated that its value was $12,000.00 (R. 130); and (2) the property was assessed for Los Angeles County tax purposes at $4,600.00 (R. 114), indicating an actual value of at least $9,000.00, due to the unequalized system, of which we respectfully ask the court to take judicial notice, to assess property at not more than half of the real value.

The property was originally purchased in 1935 by Marvin Polakoff and one A. Frankin at a bankruptcy sale for $2,625.00. The deed dated December 30, 1935

was recorded a few days later. [Exh. 1, R. 31.] A few months later A. Fratkin conveyed his interest to Marvin Polakof who then became sole owner. This deed, dated May 15, 1936, was also recorded three days later. [Exh. 2, R. 32.]

The record title remained in Marvin Polakof until April 24, 1939, when there was recorded a deed from Marvin Polakof to Ivan Polakof which was dated August 26, 1937, or more than a year and a half earlier. [Exh. 3, R. 32-34.]

Both Marvin Polakof and Ivan Polakof testified that Ivan Polakof was actually the original purchaser in 1935 of the property in common with Mr. Fratkin; that Marvin Polakof never had any interest in the property; and that the deed made in 1937 and recorded in 1939 merely restored the property to its rightful owner. Both of them gave as the reason for taking the title in the name of Marvin Polakof in 1935, that Ivan Polakof was then about to take a trip to the east and he did not want to be bothered with the property. [R. 35-36, 227.] The trial court accepted this testimony and found that the property had belonged to Ivan Polakof from the inception. [Finding V, R. 21.] We contend that this testimony is so greatly overwhelmed by the contrary evidence, disinterested and documentary, as to make it insufficient to support the trial court's findings.

Let us first quote the testimony of Ivan Polakof himself. On direct examination by his own attorney he testified [R. 227]:

> "Q. By Mr. Joseph Cogen: Do you recall the facts involving the Baldwin Park property, or prop-

erty designated and known as Baldwin Park property, on or about the latter part of the year 1935? A. Yes.

Q. Did you at that time arrange for the purchase of that property? A. I did.

Q. In whose name was that property placed at that time? A. At that time it was placed in Marvin Polakof's name.

Q. Did Marvin Polakof put up any money for the purchase of that property? A. No.

The Court: Why did you put it in Marvin's name? A. My father came to me and told me of the sale of this property in the court. I wasn't very interested, because I expected to go east to school. He convinced me it was a good one, so I raised $1300 and I said, 'Put it in Marvin's name, because I am going east.' And I expected a quick sale, and I was buying it with Mr. Fratkin for a quick sale. And I said, 'Go ahead and let Marvin sign for it, because I don't want to be bothered with it. I want to go east to school.' *And I went east and I came back, and Mr. Fratkin decided to sell me his interest.* This transaction is how I paid Mr. Fratkin off. But when I decided I was going to own the property myself I sent this deed to Marvin to sign, so I could bring down the ownership."

If the reason for taking the title in Marvin's name was Ivan's proposed trip to the east, then why was title again taken in Marvin's name *after Ivan's return from the east* when Fratkin sold out his half interest. Why did Marvin and not Ivan become the grantee in the deed [Exh. 2] executed by Fratkin and Marvin Polakof in May, 1936?

We will contrast this story with testimony of E. K. Albright, the real estate broker who arranged the original purchase of the property and who during the subsequent years had several dealings with the Polakofs—father and two sons—in connection with the management and leasing of the property. Mr. Albright testified [R. 87-92]:

"Q. Are you acquainted with Mr. Marvin Polakof, who is seated at the counsel table? A. I am.

Q. Did you have occasion to confer or discuss with him about this property between 1937 and 1939? A. I did.

Q. Did you have occasion to discuss this property with him after 1939? A. I did.

Q. Did he ever declare to you that he did not own that property? A. No; he did not declare that.

The Court: I think you had better ask him what he said.

Q. By Mr. Hindin: Let me call your attention to one occasion. Did you have occasion to go with Mr. Polakof to a zoning commission hearing? A. With Ivan Polakof—yes, with Marvin Polakof.

Q. With Marvin? A. Yes, sir.

Q. With Marvin Polakof. When was that? A. About 1939. In 1939.

Q. In 1939? A. Yes, sir.

Q. Do you remember what month it was? A. It was in the summer. It was July.

Q. In July, 1939? A. Yes, sir.

Q. You went with Mr. Polakof. Where did you go with him? A. To a planning commission.

Q. A planning commission? A. In Los Angeles.

Q. And at that time there was a matter with reference to the use of this property, was there not? A. Yes, sir.

Q. At that time did you have a conversation with Mr. Marvin Polakof relative to this property? A. Yes, sir.

Q. At that time did Mr. Polakof make any statement to you as to the ownership of this property? A. No; he did not. I needed Mr. Polakof to sign a zoning variance. I built a shed over there and they required a zoning variance.

Q. *Did you ask Mr. Polakof whether he was the owner of that property.* A. *No. I was so familiar with the situation I didn't have to ask the question. As a matter of fact, I sold the property to them and was very familiar with the conditions.*

Q. *You sold the property to Mr. Marvin Polakof?* A. *Yes, sir.*

Q. You knew that Mr. Polakof owned the property at that time?

Mr. Victor Cogen: Just a minute. I object to that on the ground that it calls for a conclusion of the witness, that he knew that Mr. Polakof owned the property.

Mr. Hindin: I will reframe the question.

The Court: He said he sold it to him.

Mr. Victor Cogen: Well, see if he is referring to 1935 or 1937 or 1939.

A. In 1935. It might have been 1936. I have the lease here. I leased it for them. First I sold it to Mr. Polakof, then I leased it for them.

Q. By Mr. Hindin: You represented Mr. Polakof, after you sold the property to him, for the purpose of leasing it? A. Yes, sir.

Q. When you asked Mr. Polakof to sign this zone variance did you ask him to sign as owner of the property? A. Yes.

The Court: If he signed any lease, produce it, please. I am not going to take secondary evidence.

Q. Mr. Hindin: Do you have that petition, then?

The Court: That is a matter of public record, isn't it?

The Witness: Yes.

Mr. Hindin: Well, it has been my experience that records of the zoning commission are not available.

The Court: Then you will have to establish that fact.

Q. By Mr. Hindin: At any rate, did Mr. Polakof declare to you that he was the owner of the property?

The Court: You have asked him that. He said Marvin Polakof never said anything about owning the property; never made any declaration one way or the other.

Q. By Mr. Hindin: Well, you have a conversation with Mr. Polakof, did you not, at the time you wanted him to sign this variance petition? A. I just asked him to sign it. I told him that the zoning commission required the signature of the owner of the property for the requested variance.

Q. What did he say? A. That he would come up and sign the petition—the request for the variance.

Q. *Between 1935 and 1939 you leased the property for Mr. Polakof?* A. *Yes, sir.*

Q. *Whom did you consult with reference to the terms of the lease?* A. *Mr. Sam Polakof.*

Q. Who was it that leased the property? A. The True-X Chemical Company.

Q. What was the rental value of the property at that time?

Mr. Victor Cogen: Just a minute. We object to it. The lease is the best evidence, if there was a lease.

The Witness: I have a copy here.

Q. By Mr. Hindin: Do you have a copy of the lease here? A. Yes, sir.

Q. Will you produce it for us, please? A. Here it is.

Q. *Was the original of this lease signed in your presence?* A. *Yes, sir.*

Q. *By whom?* A. *Mr. Sam Polakof.*

Q. Was Mr. Marvin Polakof there? A. No, sir.

The Court: Sam signed it? A. Sam: yes.

The Court: Who is Sam? A. The father. The father of Marvin.

Q. By Mr. Hindin: *When you went up to the zoning commission who went with you, Sam or Marvin?* A. *No; only Mr. Marvin Polakof.*

Q. *Marvin Polakof?* A. *I had to go down and ask Mr. Sam Polakof that the owner must sign, and he told me that Marvin Polakof would come up and attend to that.*

Mr. Victor Cogen: We object to that, Your Honor. It is hearsay.

The Court: That is hearsay. It may go out.

Q. By Mr. Hindin: Was Mr. Marvin Polakof there when you had this conversation with Sam? A. No. I arranged a meeting—

Mr. Victor Cogen: Just a minute.

Mr. Hindin: Pardon?

A. I arranged a meeting with Mr. Marvin Polakof for the variance of the zoning commission.

Q. I am talking about this other conversation you had with Mr. Sam Polakof. Was Mr. Marvin Polakof there at the time? A. No.

Q. He wasn't? A. No.

Mr. Hindin: All right. That is all."

And during cross-examination [R. 94-95]:

"Q. *This lease was signed by Sam Polakof, wasn't it?* A. *Sam Polakof; yes, sir.*

Q. *As the owner; is that true?* A. *Yes.*

Q. *You were dealing with him as the owner at that time, were you not?* A. *With Sam Polakof.*

Q. Did Marvin Polakof ever pay any money for the purchase of that property to any escrow transaction, that you know of? A. No.

Q. Did you ever see any money come through Marvin Polakof's hands? A. No, sir.

Q. *The money that you received went through the hands of Sam Polakof, did it not?* A. *Yes, sir; Sam Polakof. My dealings were solely with Sam Polakof.*"

Mr. Albright then testified that in 1939 he had gone to the Title Insurance Company with Mr. Cogen, the attorney for the Polakofs, to clear the title to the property. [R. 95-96.] Mr. Albright then gave the following testimony [R. 96-97]:

"Q. By Mr. Victor Cogen: *At the time you went up to the Title Company with me you knew that Ivan Polakof was the owner, did you not?* A. *No, I did not. I asked about that and Mr. Sam Polakof*

*told me that the title would have to be placed in Marvin Polakof's name on account of this business condition.*

Mr. Victor Cogen: I object to that on the ground it is hearsay.

Mr. Hindin: I think it is very material.

Mr. Victor Cogen: There is no showing what parties were present, or anything else.

The Court: It is hearsay. You invited it, though."

And again [R. 98-100]:

"Q. *These dealings that you had were with Sam Polakof, weren't they?* A. *Yes, sir.*

Q. Do you know Ivan Polakof? A. Yes, sir.

Q. Did you have any dealings with him? A. Yes.

Q. With reference to this property? A. Yes, sir.

Q. When did you first talk to him? A. Right after I sold the property to Mr. Polakof through the bankruptcy court.

Q. Did you have any dealings with him in August, 1937? A. I can't say definitely as to that particular date. Our dealings extended over a period of three or four years, nearly constantly, monthly.

The Court: *What was the nature of your dealings with him?* A. *Mr. Ivan Polakof became the record owner. Mr. Marvin Polakof intended to get married. He came to my office and asked us what he should do; that Marvin Polakof intended to get married and I told him it was better to have the property in his name; that you can't tell what is going to happen in a marital relation, and it would*

*be better to have that property in Ivan Polakof's name, he being a single man. That was then done.*

The Court: Who was present when that conversation took place? A. No one. He came to my office.

The Court: Who did? A. Mr. Ivan Polakof.

The Court: *Why did you suggest putting it in his name?* A. *Well, we discussed that. I suggested it for the reason that Marvin intended to get married, and he was apprehensive as to what was apt to happen, and they wanted to keep that property intact in their own family.*

The Court: Who told you that? A. Ivan Polakof."

Later on Albright again testified [R. 119-121]:

"The Court: When was this conversation that you had with Ivan concerning the transfer of the property to him? A. That was prior to the marriage of Marvin.

The Court: Who was present at that time? A. Only Mr. Ivan. Mr. Ivan Polakof and myself.

The Court: How did you come to be discussing it? A. We were very friendly. Sam Polakof was a very good friend of mine and we were rather very close friends, and whatever came up—he discussed a lot of personal matters with me, and private matters, construction and building and lease, and so on, and whenever he had any difficulty then he came to me. If he wanted to borrow money and make a loan then I endeavored to hypothecate the property if I could. And we became rather chummy. Very often he brought to me letters which he read to me, telling me his difficulties, and that was one of the reasons we were very close. The change in the prop-

erty occurred when Ivan came over and told me his brother was apt to get married and he was apprehensive as to the marital difficulties which might arise. So then I suggested that they deed this property to Ivan from Marvin.

The Court: *Was anything said at that time as to who owned the property?* A. *We knew who owned the property. That did not have to be discussed. We knew it was Sam Polakof and we didn't have to discuss that. We knew the true picture.*

The Court: But you knew it was in Marvin's name? A. Yes.

The Court: Then you didn't know who actually owned the property? A. Except from the record.

The Court: All you knew was who was the record owner? A. The record owner; that is right.

The Court: *Was there any discussion at that time in which Ivan made any comment about, 'I have money in that property', or something to that effect?* A. *No, he did not.*

The Court: *Or, 'My father has some money in it'?* A. *No; he did not say that. He took it for granted I knew the situation.*

The Court: *You didn't know whose money went originally into it?* A. *Mr. Sam Polakof. He had it*

The Court: But you don't know whether Mr. Marvin Polakof has any money in the property or not? A. No."

Even without the additional documentary evidence which we shall presently discuss, Albright's unbiased and disinterested testimony gives the true key to the manner in which the three Polakofs manipulated the property so as to keep it "intact in their own family". Obviously, for

some unexplained reason, Sam Polakof did not wish to keep either the business or property formally in his own name. Instead, both business and property were so manipulated as to maintain before the world the ostensible prosperity and financial standing of the business and at the same time make sure that the property always "remained intact in their own family".

Following this scheme *Sam Polakof told Albright "that the title would have to be placed in Marvin Polakof's name on account of this business condition"* [R. 96], *because Marvin's name was then being used as the owner of the business. When there arose some danger that Marvin's marriage might complicate matters, a deed from Marvin to Ivan was conveniently prepared in 1937 which, however, was kept secret and withheld from record for twenty months. In 1939, when the condition of the business became highly precarious and it was practically insolvent* [testimony of Maurice Kahn, accountant, R. 178-195] *the deed was finally recorded.*

That this scheme was well planned is evident from the result in this case. When the business crashed shortly after Sam Polakof's death and bankruptcy ensued, Marvin Polakof and Ivan Polakof nonchalantly came forth with their story that actually the property always belonged only to Ivan and was placed in Marvin's name only because of Ivan's trip to the east. The fact that they won below and succeeded in retaining the property "in their own family" is proof that good foresight was used by the Polakof family.

We have already shown that the surrounding circumstances and Albright's testimony flatly contradict the story of the Polakof brothers. Moreover, there are additional facts which irrefutably belie the story.

For some unexplained reason it was necessary for the Polakofs to obtain a quit claim deed from certain parties covering this property. *Such a deed was executed to Marvin Polakof and not to Ivan Polakof as grantee on July 12, 1938, and recorded on August 5, 1938.* [Exh. 12, R. 207-209.] This deed was therefore executed nearly a year after August 26, 1937, when Marvin Polakof allegedly conveyed the property to Ivan Polakof. Why was Marvin's name again used in the deed made in 1938? Was Ivan Polakof again taking a trip to the east?

Neither Marvin Polakof nor Ivan Polakof offered any explanation for taking the deed in Marvin's name in 1938. Marvin Polakof even testified that he did not recall the transaction and had never seen the deed. [R. 206.] But the County Recorder's statement that the deed was [R. 209] *"recorded at request of grantee"* is mute and irrefutable proof to the contrary.

Finally, as late as 1940 Sam Polakof listed this property as the most valuable asset of the business in the financial statement on behalf of "Sam Polakof and Sons" which showed a net worth of $27,623.99. [Exh. 7, R. 147-150.] A full description of the property was given together with its value of $12,000.00, leaving no doubt as to what was meant. [R. 150.]

Thus, even after the deed from Marvin Polakof to Ivan Polakof had been recorded for several months Sam Polakof, the actual manager of the family's business and property, continued to list the property as an asset of the business.

We have devoted a substantial portion of this brief to a discussion of the facts contained in the record, because we believe that this appeal involves essentially the correctness of the findings of fact. We have attempted to present—in condensed form—all of the material facts which bear upon the disputed issues. If some material facts have been inadvertently omitted, we are certain that they will be considered by the court in its careful reading of the record.

## Specification of Errors.

I. The finding that the defendant Ivan Polakof was the owner of the property involved in this action since 1935 and that the defendant Marvin Polakof never had any interest in the property [Findings IV and V, R. 19. 21] is against the weight of and not supported by the substantial evidence.

II. The finding that there was no fraud in the transfer of the record title to the property by the defendant Marvin Polakof to the defendant Ivan Polakof [Findings VIII and IX, R. 22] is against the weight of and not supported by the substantial evidence.

III. The finding that the defendant Marvin Polakof was solvent and had sufficient other property to pay the creditors in April, 1939 [Finding XI, R. 23] is against the weight of and not supported by the substantial evidence.

IV. The conclusions that the defendant Ivan Polakof is entitled to retain ownership of the property [1st Conclusion, R. 23-24] and that the plaintiff is entitled to no relief [2nd Conclusion, R. 24] are erroneous, for they are based upon erroneous findings.

## ARGUMENT.

### POINT I.

### The Finding That the Property Was Owned Solely by Ivan Polakof and That the Creditors of the Bankrupt Business Have No Claim to It Is Against the Overwhelming Weight of the Evidence.

We are aware of the reluctance of an appellate court to disturb the findings of a trial court upon conflicting evidence. But this being an equity case the rule is that:

> "Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity."
>
> *Morley Co. v. Maryland Casualty Co.,* 300 U. S. 185, 191.

In *New York Life Insurance Co. v. Simons,* 1 Cir., 60 F. (2d) 30, 32, the court said:

> "This is an appeal in equity, and the case comes here to be heard on the record, except that facts found by the District Judge will be accepted by this court, unless the findings of fact appear to be clearly wrong. For an appellate court to hold that a finding of fact by a sitting justice in an equity case is clearly wrong, it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the inference of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found."

The same rule is expressed in *Laursen v. Lowe,* 6 Cir., 46 F. (2d) 303, 304, as follows:

> "While much weight is ordinarily, and rightly, given to the opinion of the trial judge who has seen the witnesses upon the stand, noted their demeanor, and heard them testify, yet in an equity appeal the obligation is imposed upon this court of reviewing the record, weighing the evidence, and determining as best we may whether the plaintiff has sustained the burden of proof resting on him."

We submit that the record in this case clearly calls for a reversal of the trial court's finding that Ivan Polakof was the exclusive owner of the property.

In connection with this finding the trial court said [R. 268]:

> "The facts preponderantly show that this property belonged to Ivan from the inception of the transaction. There is no dispute about the fact that Ivan paid off this other co-owner, by a cashier's check, I believe, of something over a thousand dollars. That is one of the strongest evidences of interest in property, to pay off the encumbrance that effects it. I further feel that there is no evidence here that these people did what is ordinarily done when there is a piece of property in one's name, that is, to hold it out to his creditors."

We believe that the trial court misinterpreted the evidence with respect to both the payment by Ivan of an incumbrance on the property and the holding out to the creditors.

First as to the incumbrance on the property. This consisted of a mortgage by Marvin Polakof to A. Fratkin

for $1,000.00, when the latter conveyed his half interest in 1936. [R. 159.] That mortgage was signed by Marvin Polakof and not by Ivan Polakof, although Fratkin would probably have known that Ivan Polakof was the owner, if such had been the fact, and would probably have demanded the signature of the real owner. At any rate, the mortgage was not paid until 1939, after the deed from Marvin Polakof to Ivan Polakof had been recorded. [R. 198-199, 223.]

The payment of the incumbrance by Ivan Polakof in 1939 was thus a part of the very fraudulent scheme whereby the property was recorded in Ivan Polakof's name at the time when the business was already in its highly precarious condition. It certainly behooved them to have the payments made by Ivan Polakof after the property had been transferred to his name. But who made the payments for taxes, interest, and other expenses between 1935 and 1939? If Ivan Polakof made such payments during these years, when he was supposedly the owner, why did he not testify or produce any proof about them?

Had the defendants produced some evidence of expenditures for the property by Ivan Polakof before 1939 it would have lent some credence to their story. But the only payments by Ivan Polakof of which there is any proof are the $1,000.00 in June, 1939, and a check for a tax payment in December, 1939. [Exh. D, R. 220-224, 235.] Where were the checks for the taxes and similar payments for the preceding years?

In *Hann v. Venetian Blind Corp.*, 9 Cir., 111 F. (2d) 455, 459, this court recently said that:

> "* * * when there is material testimony which would establish a fact in issue in the present ability of the litigant to present and he fails to do so, and fails to offer a reasonable excuse for such failure, the presumption follows that such testimony, if presented would be against such party * * *"

Is it then not reasonable to presume from the failure of the defendants to produce any proof of expenditures by Ivan Polakof for the property before 1939, that no such expenditures were ever made?

It thus follows that the first premise for the court's decision, *i. e.*, the payment by Ivan Polakof of an incumbrance on the property in 1939, actually was only a link in the chain forged by the Polakofs in order to keep the property "intact in the family."

The second ground of the court's decision—that the property was not held out to creditors—is even more tenuous.

The court must have referred to the following testimony by Ivan Polakof [R. 252-253]:

> "Q. You knew, then, that Marvin was in business for himself, didn't you? A. Yes; I knew that.
>
> Q. And you knew that title to this Baldwin Park property was in his name, didn't you? A. Yes. It is a matter of record. Sure.
>
> Q. And notwithstanding that you knew he was in business and that the property was in his name you

did nothing about it? A. I impressed upon him that he should never hold himself out that he was the owner of that property. And he never entered it on any financial statement, even when it was in his name. Everyone that knew me will say that it was my property. In fact, they didn't know Marvin.

Q. But why did you warn Marvin not to hold it out to his creditors? A. I didn't want him to represent to the creditors that he had that property.

Q. But you knew he had creditors in the business, didn't you? A. But he wasn't getting credit on that particular piece of property."

It is incomprehensible how this testimony could even have been considered, in view of the admitted fact that Sam Polakof arranged all the credits for the business and that Marvin Polakof had nothing to do with representing to creditors, one way or another.

The trial court apparently overlooked the very important fact that as late as March 1, 1940, Sam Polakof, the actual manager of the business, did expressly represent this property as being the most important asset of the business. [Exh. 7, R. 147-150, especially p. 150.]

We summarize the first part of our argument with the conclusion that a careful analysis of the evidence proves overwhelmingly that Ivan Polakof was never the owner of the property herein involved, that the property was always part of the business carried on by the Polakof family under the formal ownership of Marvin Polakof and that the creditors of the bankrupt business—represented by the plaintiff as the trustee in bankruptcy—are legally and equitably just as much entitled to the real property as they are to the other assets of the bankrupt business.

## POINT II.

### The Transfer of the Property by Marvin Polakof to Ivan Polakof Was Fraudulent and Void as to the Trustee in Bankruptcy.

Section 70e of the Bankruptcy Act (11 U. S. C. A. 110e) provides that:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication."

This section has been construed to give the trustee the right to set aside any transfer which is fraudulent against creditors under the state laws (*Stellwagen v. Clum,* 245 U. S. 605, 614) and to make the state laws applicable in a suit by the trustee to recover the fraudulently transferred property (*Barr v. Roderick, D. C. Cal.,* 11 F. (2d) 984, 985).

It is therefore important to examine the laws of California which are applicable to this situation.

Since September, 1939, the Uniform Fraudulent Conveyance Act (Secs. 3439.01-3439.13 of the Civil Code of California) has superseded and broadened the statutory provisions relating to fraudulent conveyances. But since some of the acts of the defendants in this case antedate the adoption of the Uniform Act. it is proper to consider the previously existing statutes and decisions.

Section 3439, Civil Code of California, in effect until September, 1939, provided:

> "TRANSFERS, ETC., WITH INTENT TO DEFRAUD CREDITORS. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

The fraud covered by this section was of the class generally referred to as actual fraud. It was different from the fraud which is merely constructive, *i. e.,* where there was no fraudulent intent but merely a transfer by an insolvent without consideration, which was covered by Section 3442, Civil Code. (*Hanscombe-James-Winship v. Ainger,* 71 Cal. App. 735.]

In *Borgfeldt v. Curry,* 25 Cal. App. 624, 626, the court said in discussing the said two sections:

> "These sections, in common with the remainder of the code, should be liberally construed with a view to effecting their purpose. That purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take hazards and risks thereof as well as the chances for profit. If misfortune should overtake him he must face it himself, and not attempt to saddle it on to those who have extended him credit and trusted in his commercial integrity."

We believe that the evidence unquestionably shows that the transfer of the real property to Ivan Polakof was an integral part of a continuous course of intentionally fraudulent conduct by the bankrupt and his relatives.

It is an accepted axiom that fraud can never be proved directly but must be spelled out from the circumstances.

It is needless to repeat the various facts and circumstances previously discussed which inevitably point to a conspiracy to keep the property "intact in the family" under all circumstances. We only wish to stress one circumstance—the withholding of the deed by Marvin Polakof to Ivan Polakof from record for twenty months —which was commented upon in *Bush & Mallet Co. v. Helbing,* 134 Cal. 676, 681, as follows:

> "The fact that a deed is kept secret and not recorded is a very potent badge of fraud."

There was some testimony and discussion at the trial about the solvency or insolvency of the business in 1939, when the deed from Marvin Polakof to Ivan Polakof was recorded. [R. 178-195.] In its decision the court commented on that question and stated that [R. 269] "the accountant figured out they were solvent by about $37, but he stated that figure might vary as much as $500 one way or the other."

Even if insolvency were an important element of plaintiff's cause of action, it was amply established by the evidence. When a transfer is made without consideration—Marvin Polakof received only $10.00 for his deed to Ivan

Polakof [R. 38]—the fact that the transferor is solvent by a few dollars does not validate the transfer in so far as creditors are concerned.

As was said in *Borgfeldt v. Curry,* 25 Cal. App. 624, 627:

> "The principal argument in the briefs of both appellant and respondent is addressed to the question as to whether at the time of the transfer Borgfeldt was actually solvent or insolvent. Appellant constructs from the testimony a table of assets and liabilities, which he contends show Borgfeldt to be insolvent. Respondent takes the same table, and contends that it proves the contrary. The difference between them arises from the item of one thousand dollars, previously referred to as having been put into a new business on the day preceding the transfer, the appellant contending that this sum should not be regarded as assets, and the respondent contending that it should, and that so regarding it, the assets of Borgfeldt were superior to his liabilities by the sum of about three hundred dollars. In the view we take of the case, however, it matters not whether this sum is included in Borgfeldt's assets or not. Admitting that by a small margin he may be shown to have been solvent, it still remains patent from the evidence that the transfer was made in contemplation of insolvency, and as such, is equally within the terms of the sections of the code cited."

But the question of solvency or insolvency is actually of no importance when intent to defraud is shown. As

was said in *First National Bank of Los Angeles v. Maxwell,* 123 Cal. 360, 372:

> "In Bigelow on Fraud, Volume 2, page 393, it is said 'Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm anyone, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors'; and in *Hager v. Schindler,* 29 Cal. 60, it was said: 'A rich man may make a fraudulent deed as well as one who is insolvent.'"

In *Benson v. Harriman,* 55 Cal. App. 483, 485, the court said:

> "Moreover, the rule in this state is that if a conveyance is made with intent to defraud creditors, it is void, notwithstanding the debtor has other property ample in amount to satisfy his creditors."

Consequently, the finding of the trial court [Finding XI, R. 23] that Marvin Polakof was solvent in 1939 is of no importance, even if it had been based upon sufficient evidence, which we seriously dispute.

With respect to the findings of the trial court that there was no fraud in the transfer of the property by Marvin Polakof to Ivan Polakof [Findings VIII and IX, R. 22], they are based solely upon the statements of the two defendants. This uncorroborated testimony is opposed to the great weight of the evidence, documentary and disinterested, which revealed the manipulations of the property

in order to keep it from creditors. It is therefore of no probative value.

The situation is similar to that involved in *Benson v. Harriman,* 55 Cal. App. 483, where a fraudulent grantor also denied vehemently that he had intended to defraud his creditors. The court said (p. 489):

> "Quite naturally, the defendant, Frank G. Harriman, denied that he had any intention of defrauding the plaintiff and he even went so far as to claim that he was able and willing to pay the plaintiff what he owed him. But his actions speak louder than words and his declared willingness to pay could avail nothing in the face of the determined efforts that were required to collect the judgment."

In *Knox v. Blanckenburg,* 28 Cal. App. 298, 301, the court commented on similar testimony as follows:

> "The inevitable result of this act on the part of the defendant Theodore was to hinder and delay his creditors in the enforcement of their just claims. His own bare statement, unsupported by any facts that in giving the property to his wife he did not intend to hinder or delay his brother in collecting his debt, cannot overcome the presumption that he intended the inevitable consequences of his willful and intentional acts."

## Conclusion.

We earnestly believe that the evidence unequivocally shows that the defendants have succeeded, by means of a well planned but fraudulent scheme, in retaining from the creditors the real property which was the most valuable asset of the bankrupt.

In the words of the Supreme Court of California in *Tobias v. Adams,* 201 Cal. 689, 696:

> "If a transaction of this kind were upheld by the courts then fraud uncurbed and brazen would stalk over all the land."

We therefore respectfully ask that the judgment appealed from be reversed and judgment granted to the plaintiff as demanded in the complaint.

Respectfully submitted,

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